Supreme Court, U.S.
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NO. 99-____

IN THE

Supreme Court of the United States

EDDIE BARTELS, *ET AL.*
Petitioners,

v.

RICHARD RILEY, SECRETARY OF EDUCATION, *ET AL.*,
Respondents.

On Petition for a Writ of Certiorari to the
Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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September 27, 1999

3 DEP

QUESTION PRESENTED

Do federal laws concerning the federal student loan program, 20 U.S.C. §§ 1071 *et seq.*, preempt state agency law and any other applicable state laws that would allow borrowers to raise fraudulent misrepresentations by a school as a defense against repayment of a loan in circumstances where the school acts as the lender's agent?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners are Eddie Bartels, Alfreda C. Bantum, Ruby C. Carr, Michele Cross, Sharon Days, Iris Hull, Mary L. Manley, Iris Miller, Linda Mosley, Alethia Pickney, Octavis Roberson, Leonie Smart, Shirley Travis, and Doretha Young, all of whom are former students of Riley Training Institute of Georgia. Petitioners were plaintiffs and appellants in the proceedings below. Defendants-appellees in the proceedings below are Secretary of Education Richard Riley, in his official capacity, the Georgia Higher Education Assistance Foundation, the Higher Education Assistance Foundation, and the Student Loan Marketing Association. Defendants-appellees are assignees of one or more student loans for petitioners.

Alabama Commercial College, the operator of the Riley Training Institute, was a defendant in the district court below but was not a party to the appeal. A default judgment was entered against Alabama Commercial College in the district court.

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The opinion of the Court of Appeals for the Eleventh Circuit is not reported but is set forth in the Appendix at pages 1a-13a. The opinion of the district court that was affirmed in relevant part by the Eleventh Circuit is reported at 918 F. Supp. 1565 and is set forth at pages 14a-29a of the Appendix.

JURISDICTION

The judgment of the Eleventh Circuit was entered on June 29, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

The Appendix, at 32a, sets forth the regulations cited by the Eleventh Circuit as the basis for its ruling that federal law preempts the common law of agency and any other applicable state laws that impose liability on loan holders for the school's acts as agent of the lenders. *See* Appendix 8a (citing 34 C.F.R. §§ 682.200, 682.206(a), (b) (1998)).

STATEMENT OF THE CASE

This petition seeks review of an Eleventh Circuit ruling that, because the Guaranteed Student Loan Program ("GSLP") permits lenders to use schools as their agents in arranging loans, state laws that allow a borrower to raise fraudulent misrepresentation by the lender's agent as a defense to collection of a loan are preempted. The issue presented here is closely related to the issue presented in the pending petition for certiorari in No. 99-395 (filed Sept. 2, 1999), which seeks review of the District of Columbia Circuit's ruling that, because federal authorities had decided not to enforce federal regulations designed to make lenders liable for fraudulent representations by a school acting on its behalf, a local statute that authorizes borrowers to raise defenses based on the school's misconduct was preempted.

Armstrong v. Accrediting Council for Continuing Education and Training, Inc., 168 F.3d 1362, *amended*, 177 F.3d 1036 (D.C. Cir. 1999). We urge that these two petitions be considered together. Both decisions address federal preemption of claims based on misconduct by schools that act on behalf of lenders; both decisions find preemption of state law on the basis that federal law *permits* schools to act as agents for lenders; and both preemption rulings are in conflict with the Seventh Circuit's analysis in *Veal v. First American Savings Bank*, 914 F.2d 909 (1990), which stated that state law defenses were not preempted by the Higher Education Act.

Petitioners in this case are student loan borrowers who enrolled in a Georgia vocational school called Riley Training Institute during the period 1988-1991. The Training Institute subsequently closed and filed for bankruptcy. In 1993, petitioners brought suit seeking damages from the Training Institute for fraud, breach of contract and unfair trade practices. The bankruptcy court excepted the action from the automatic stay and the school, which appears to have no assets, defaulted. Petitioners also joined as defendants the Secretary of Education, and two guaranty agencies and a secondary market purchaser of student loans who, as holders of the loans arranged by the Training Institute under the GSLP, demanded that petitioners repay the loans despite the school's misconduct. After the school defaulted, the case proceeded against these defendants. Jurisdiction over this action arose under 20 U.S.C. § 1082(a)(2), 28 U.S.C. §§ 1331 and 1367. *See Bartels v. Alabama Commercial College*, 54 F.3d 702 (11th Cir. 1995).

As discussed in more detail in the petition in *Armstrong v. Accrediting Council for Continuing Education and Training, Inc*, No. 99-395, the GSLP is an incentive program established by the Higher Education Act of 1965, 20 U.S.C. § 1071-1146a

("HEA"), to encourage lenders to make student loans by paying interest subsidies and providing federal reinsurance against default. *See* 34 C.F.R. § 682.100 (1992).[1] Petitioners alleged that the Training Institute acted as agent for the lenders in arranging their GSLP loans and used fraudulent misrepresentations to procure petitioners' signatures on the loan documents. Petitioners sought a declaratory judgment that, because of the school's role in arranging these loans, the loans are subject to defenses arising from the school's misrepresentations. The common law of Georgia, like that of other states, provides that, where a seller acts as agent for a lender in arranging financing to pay for the seller's goods or services, the lender may be held responsible for misrepresentations made by the seller. *See* O.C.G.A. §§ 10-6-56, 10-6-60; *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113, 116 (1948). Petitioners also presented alternative theories for raising these defenses, but these alternative theories are not included in this petition.

Defendants moved to dismiss the agency claim under Fed. R. Civ. P. 12(b)(6) on the theory, among others, that the GSLP preempts any state laws that would make lenders responsible for misconduct by schools acting as their agents. The GSLP permits lenders to use schools as their agents for marketing loans, but does not require that they do so. If a lender chooses to use the school to perform the lender's responsibilities in the loan-making process, such as completing and having the borrower sign the promissory note, the GSLP regulations provide that the school is

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[1] In 1992, the GSLP was renamed the "Federal Family Education Loan Program." Pub. L. No. 102-325, § 411, 106 Stat. 510 (1992). The Circuit Court's opinion used the name of the program when the loans at issue were made, Appendix at 3a, and we follow the same practice in this petition.

considered to have "originated" the loan. *See* 34 C.F.R. §§ 682.200(b), 682.206(a), (b). While these "origination" regulations permit lenders to delegate loan making responsibilities to schools, they also indicate that "such a practice is discouraged," 41 Fed. Reg. 4499-4500 (1976), by explicitly limiting lenders' ability to rely on representations by schools that originate loans on their behalf. *See* 34 C.F.R. § 682.206(a)(2). Department of Education policy statements and regulations also warn that, if the school acts as the lender's agent or "originates" the loan, the lender and subsequent holders of the loan may be subject to defenses based on the school's misconduct.[2] Nonetheless, the district court accepted defendants' argument that the state common law rule that a principal is responsible for misrepresentations of its agent is preempted because, the court asserted, the agency relationship alleged by petitioners "is mandated by the HEA and federal law." Appendix at 21a.

On appeal, the Eleventh Circuit did not endorse the district court's conclusion that the HEA "mandated" that the school act as the lender's agent. Instead, in an unpublished opinion, the Circuit Court held that state law is preempted if it is based on conduct that is "mandated *or contemplated by the HEA*." *Id.* at 8a (italics added). Because federal law "expressly *permits* lenders to delegate lender functions to schools with which they

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[2]Letter from Acting Assistant Secretary Kenneth D. Whitehead to Hon. Stephen J. Solarz, May 19, 1988, quoted in *Jackson v. Culinary School of Washington, Ltd.*, 27 F.3d 573, 584-85 (D.C. Cir. 1994); *see also* 34 C.F.R. § 682.604(f)(2)(iii) (providing that students should be counseled that they cannot raise school-related defenses on a loan, "other than a loan made or originated by the school"); 55 Fed. Reg. 48327 (1990) (describing "longstanding view" that if an origination relationship exists, the school's failure to deliver services provides the student a defense).

enter into 'origination relationships,'" the Circuit Court concluded that "the Georgia law of agency and any other applicable state laws" are preempted to the extent they impose liability on loan holders for the "school's acts as purported agents of the lenders." *Id.* at 8a (italics added). In a footnote, the Circuit Court emphasized that state agency law claims are preempted even where, as here, the borrower alleges that the school had "originated" the loans within the meaning of federal law. *Id.* at 9a n.6.

REASONS FOR GRANTING THE WRIT

The pending petition for certiorari in *Armstrong v. Accrediting Council for Continuing Education & Training, Inc.*, No. 99-395, sets forth the principal reasons why this Court should grant certiorari to address the issue of whether federal law preempts state laws that allow borrowers to raise defenses based on the fraud or other misconduct by schools that arrange loans on behalf of lenders. We request that those arguments be considered in evaluating this petition as well, because the Eleventh Circuit's ruling below, like the District of Columbia Circuit's ruling in *Armstrong*, rests on the premise that state laws that protect borrowers from fraud and other abuses by schools acting on behalf of lenders are preempted simply because federal law permits schools to act on lenders' behalf -- a premise that is clearly contrary to this Court's preemption jurisprudence.

I.

A cardinal teaching of this Court's preemption jurisprudence is that a state's ability to regulate is not displaced merely because state law attaches legal consequences to conduct that is permitted by federal law. To the contrary, preemption requires an "actual conflict" that arises because "it is impossible to comply with both state and federal law," or because the state law "stands as an

obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984). Thus, in *Freightliner Corp. v. Myrick*, 514 U.S. 280 (1995), this Court held that a negligence action that would impose liability on a truck manufacturer for failure to use brake equipment that was not required by federal law was not preempted because, in the absence of any federal requirement, there was no preemptive conflict. *Id.* at 289. In *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987), this Court held that a state statute requiring employees to provide particular employment benefits to pregnant employees was not preempted by the federal Pregnancy Discrimination Act because compliance with both laws was possible and nothing in the Discrimination Act precluded states from imposing obligations that were more favorable to employees than those set forth in federal law. *Id.* at 291.

The Eleventh Circuit's preemption ruling below, like the ruling in *Armstrong*, 168 F.3d at 1370, is inconsistent with this principle. The Eleventh Circuit concluded that federal law displaced state agency law because the loan program "expressly contemplated" and "expressly permits" lenders to use schools as their agents. Appendix at 7a-8a. However, because federal law permits, but does not require, lenders to use schools as their agents, compliance with both state law and federal law is not impossible. In addition, there is no provision of federal law indicating a significant federal interest in lenders using schools as their agents, much less a federal interest in absolving lenders from any responsibility when their agents use fraudulent misrepresentations to procure loans.

The Eleventh Circuit's opinion asserts that "[a] majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which

impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA." Appendix at 7a & n. 4. As support for this statement, the Eleventh Circuit cites three district court decisions; two of these decisions were vacated by the District of Columbia Circuit and the third decision, by the Southern District of West Virginia, held that state and federal law were in conflict because the court concluded that the conduct that triggered the state statute at issue was *required* by federal law -- not because the conduct at issue was "contemplated" by federal law.[3] The ruling by the Eleventh Circuit that federal law preempts state law merely because federal law "permits" schools to arrange loans for lenders (although it does not permit or endorse fraudulent misrepresentations by schools in this or any other context), has no support in the decisions of this Court and displaces an enormous body of state law that defines rights and obligations that are not addressed in federal law.

II.

This Court's decisions also make clear that preemption requires a statutory or regulatory text that mandates preemption

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[3]*See Tipton v. Secretary of Educ.*, 768 F. Supp. 540, 558 (S.D.W.Va. 1991) (concluding that state claim under West Virginia statute was preempted because the court believed that state statute attached liability to actions by banks that are "expressly dictated by the federal act and regulations"). The District of Columbia decisions are *Jackson v. Culinary Sch. of Washington*, 788 F. Supp. 1233, 1247 (D.D.C. 1992), *rev'd*, 27 F.3d 573 (D.C. Cir. 1994), *vacated*, 515 U. S.1139 (1995), *on reconsideration*, 59 F.3d 354 (D.C. Cir. 1995) (finding preemption based on the conclusion that federal law requires school's participation in preparation of loan instruments), and *Armstrong v. Accrediting Council for Cont. Educ. & Train., Inc.*, 832 F. Supp. 419 (D.D.C. 1993), *vacated and remanded*, 84 F.3d 1452 (D.C. Cir. 1996), a precursor to the District of Columbia Circuit decision that is the subject of Petition No. 99-395.

or at least establishes a federal interest that will be substantially frustrated by state law. *See Puerto Rico Consumer Affairs Dep't v. Isla Petroleum Corp.*, 485 U.S. 495, 501 (1988) (no preemption where there is no text that can "plausibly be interpreted as *prescribing* federal preemption."); *Ray v. Atlantic Richfield Co.*, 435 U.S. 131, 172 (1978) (no preemption where agency has proposed, but has not adopted, regulations that might conflict with state law). In *Armstrong*, the District of Columbia Circuit identified no statutory or regulatory text as the basis for preemption but, instead, cited the decision by federal officials not to enforce a federal regulation as the source of a preemptive federal policy. *See* Petition No. 99-395 at 12-13, 15-16. In the decision below in this case, the Eleventh Circuit did identify a text as the basis for its ruling, namely, the GSLP regulation that "expressly permits lenders to delegate lender functions to schools with which they enter into 'origination relationships.'" Appendix at 8a (citing 34 C.F.R. §§ 682.200, 682.206(a), (b) (1998)). These permissive regulations, however, do not provide a basis for displacing state law. To the contrary, the regulations indicate that federal law *discourages* lenders from delegating their responsibilities to schools by providing that lenders may not rely on representations by schools that originate loans on their behalf. *See* 34 C.F.R. § 682.206(a)(2).

The only other basis for preemption identified by the Eleventh Circuit is the panel's suggestion that, because federal law encourages "the participation of lenders and guaranty agencies in the [GSLP] program," the common law of agency "and any other applicable state laws" that impose liability on lenders and guaranty agencies "based on the school's exercise of lending functions" are preempted because they frustrate the "'purposes and objectives of Congress.'" Appendix at 8a (quoting *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U. S. at

281). This rationale is inconsistent with this Court's decisions, which have repeatedly held that the existence of a federal program encouraging an activity does not immunize participants in the program from tort liability or other remedies under state law. Thus, this Court has held that the federal law promoting nuclear power does not implicitly preempt all remedies for those who are injured by exposure to hazardous materials, *Silkwood*, 464 U.S. at 257-58, and the federal interest in collecting on defaulted loans does not preempt state property laws that might handicap federal collection efforts. *United States v. Yazell*, 382 U.S. 341, 349-350 (1966). Similarly, the federal mandate to encourage lenders to make student loans does not support the conclusion that federal law immunizes lenders from responsibility for fraudulent conduct by their agents. Indeed, under the Eleventh Circuit's ruling, federal law provides a safe-harbor for fraud by providing that lenders have no liability for their agents' misconduct, and the borrowers, who are the intended beneficiaries of the loan program, are required to repay loans procured through misrepresentation by the lenders' agents. Nothing in the GSLP suggests that Congress intended to displace state law in this manner.

Because the Eleventh Circuit's preemption ruling rests on the longstanding regulations that permit lenders to delegate lender functions to schools, its ruling is more sweeping than the District of Columbia Circuit's holding in *Armstrong*. The District of Columbia Circuit's ruling presumes that the preemption of state law ended in 1992 when federal enforcement policy changed. *Armstrong*, 168 F.3d at 1370. Under the Eleventh Circuit's ruling, however, state agency law and similar laws continue to be preempted because the GSLP regulations that authorize "origination relationships" between schools and lenders have never been repealed. 34 C.F.R. § 682.206 (1998). The Eleventh

Circuit's conclusion that, because federal law permits certain conduct, it precludes states from protecting borrowers from fraudulent representations that occur in the course of that conduct, creates an enormous gap in the laws protecting student borrowers from abuses and should be reviewed by this Court.

CONCLUSION

This Court should issue a writ of certiorari to review the Eleventh Circuit's ruling that state agency law is preempted by the federal student loan program because federal law permits lenders to use schools as their agents in arranging loans.

Respectfully submitted,

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September 27, 1999

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Department of Education Guaranteed Student Loan Program Regulations 32a

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No 98-8885

D. C. Docket No. 2:94-CV-150-AAA

EDDIE BARTELS, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

ALETHIA PINKNEY, Individually and on behalf of all others similarly situated,

Plaintiff.

SHIRLEY TRAVIS, Individually and on behalf of all others similarly situated; IRIS HULL Individually and on behalf of all others similarly situated; SHARON DAYS, Individually and on behalf of all others similarly situated; LEONIE SMART, Individually and on behalf of all others similarly situated; MARY L. MANLEY, Individually and on behalf of all others similarly situated; DORETHA YOUNG, Individually and on behalf of all others similarly situated; RUBY C. CARR Individually and on behalf of all others similarly situated; ALFREDA C. BANTUM, individually and on behalfofall others similarly situated; OCTAVIS ROBERSON, Individually and on behalf of all others similarly situated; IRIS MILLER; LINDA MOSLEY; MICHELE CROSS,

Plaintiffs-Appellants,

VERA BURSON,

Plaintiff,

versus

ALABAMA COMMERCIAL COLLEGE, INC., d.b.a.,

Riley Training Institute of Savannah, Waycross and Brunswick, Georgia,

Defendant,

RICHARD RILEY, Secretary, U.S. Department of Education, in his official capacity, HIGHER EDUCATION ASSISTANCE FOUNDATION; GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION; STUDENT LOAN MARKETING ASSOCIATION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(June 29, 1999)

Before TJOFLAT and BIRCH, Circuit Judges and BRIGHT, Senior Circuit Judge.*

PER CURIAM:

Appellants represent a putative class of student loan borrowers seeking relief from enforcement of their loan repayment obligations. Appellants filed suit in federal court against the Riley Training Institute ("Riley" or "the school"), the Secretary of Education ("Secretary"), the Higher Education Assistance Foundation ("HEAF"), the Georgia Higher Education Assistance Corporation ("GHEAC "), and the Student Loan Marketing Association (" Sallie Mae"). They alleged fraud against Riley and sought on various grounds to assert the school's fraud as a defense to loan collection by the remaining defendants, current holders of the loans. They also asserted that certain of the Secretary's wage garnishment procedures violate due process.

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* Honorable Myron H Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

After granting default judgment against Riley, the district court dismissed all claims against the Secretary, HEAF, GHEAC, and Sallie Mae (collectively "the non-school defendants") under Fed. R. Civ. P. 12(b)(6). The court determined that appellants could not assert the school's fraud as a defense to loan collection by the non-school defendants. *Bartels v Alabama Commercial College*, 918 F. Supp. 1565, 1569-73 (S.D. Ga. 1995). It also determined that the Higher Education Act ("HEA") deprived the court of jurisdiction over the due process claims against the Secretary. *Id.* at 1573-74.

Appellants appeal the dismissal of the claims against the non-school defendants. We affirm the dismissal of the fraud-related claims against the non-school defendants, but reverse the dismissal of the due process claims against the Secretary. We remand the due process claims to the district court for a determination of whether the claims are "ripe" for judicial review and, if necessary, consideration on the merits.

I. BACKGROUND

Appellants ("the borrowers") obtained student loans under the federal Guaranteed Student Loan Program ("GSLP")[1] to attend Alabama Commercial College, d/b/a the Riley Training Institute, between 1988 and 1991. Riley operated as a licensed and accredited vocational school from 1988 to 1992, offering twenty-six-week courses purporting to train and qualify students for high-paying jobs in technical fields. The borrowers discovered that the courses provided by Riley failed to provide students with adequate training or qualifications to obtain jobs in the advertised fields. The school also failed to deliver on promises to provide job placement services for students after graduation.

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[1] Congress enacted the GSLP as part of the Higher Education Act of 1965. *See* Higher Education Act of 1965, Pub. L. No. 89-329, §§ 421 *et. seq.*, 79 Stat 1219 (1965). For the laws and regulations governing the GSLP, see 20 U.S.C. §§ 1071 *et. seq.* (1994 & Supp. II 1996) and 34 C.F.R. § 682.100 *et. seq.* (1998).

The borrowers eventually defaulted on their student loans. Various loan guaranty agencies paid claims on the loans pursuant to the terms of reinsurance agreements previously executed in accordance with the provisions of the GSLP. *See* 20 U.S.C. § 1078 (1994). The guaranty agencies and the Secretary initiated loan collection proceedings against the borrowers. Borrowers received wage garnishment notices from the Secretary, and some borrowers responded to the notices by borrowing money to repay the loans in their entirety.

The borrowers filed suit in United States District Court in the Southern District of Georgia on August 17, 1993. In an amended complaint filed November 1, 1995, the borrowers asserted numerous claims against Riley based on the school's failure to provide adequate training and job placement services, including fraud, breach of contract, ex delicto contract breach, negligence per se, and unfair trade practices. The borrowers sought to interpose the school's conduct as a defense to loan collection by the non-school defendants, and offered several theories to that end. The borrowers asserted that the school acted as an agent of non-school defendants in procuring loans for the borrowers, and that under federal regulations and the Georgia law of agency, the non-school defendants were liable for the school's conduct.

The borrowers also asserted that the FTC Holder Rule, 16 C.F.R. § 433.2, subjected the non-school defendants to claims and defenses the borrowers might assert against the school.

Finally, the borrowers asserted that certain of the Secretary's wage garnishment procedures violated due process in that they failed to afford borrowers adequate means of challenging garnishment.

Among other things, the borrowers requested a refund of their loan payments, rescission of the loan contracts, an injunction against loan collection, and a declaration that the Secretary's wage garnishment procedures violate due process.

The district court entered a default judgment against Riley after Riley failed to answer the complaint. Riley has since entered into bankruptcy.

The non-school defendants filed a motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief may be granted. The district court granted the motion and dismissed all claims against the non-school defendants. *Bartels*, 918 F. Supp. at 1568. The court rejected the borrowers' theories for holding the non-school defendants liable for the school's conduct. *Id.* at 1569-73. It determined that the borrowers had failed to state a claim under the Georgia law of agency. *Id.* at 1571. It determined that the HEA mandated the close relationship between the school and the non-school defendants, and that federal law therefore preempted the agency claims based on that relationship. *Id.* The court also determined that the borrowers failed to state a claim for relief under the FTC Holder Rule.[2] *Id.* at 1570-71. It determined that the borrowers had no rights under

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[2] The FTC Holder Rule states that it

> is an unfair or deceptive act or practice within the meaning of Section 5 of [the Federal Trade Commission Act, 15 U.S.C. § 41 *et. seq.*,] for a seller, directly or indirectly, to:
>
> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2(1998).

the Holder Rule where the loan contracts did not include the notice provision required by the rule. *Id.* Finally, the court determined that the HEA's "anti-injunction" provision[3] deprived the court of jurisdiction over the borrowers' due process claims. *Id.* at 1573-74.

This appeal followed.

II. ISSUES ON APPEAL

The borrowers raise the following contentions on appeal:

1. The district court erred in determining that the HEA preempted the borrowers' claim under the Georgia law of agency.

2 The district court erred in determining that the borrowers had no rights under the FTC Holder Rule.

3. The district court erred in determining that the HEA's "anti-injunction" provision deprived the district court of jurisdiction over the borrowers' due process claims.

We reject the first two contentions and affirm the dismissal of the claims against the non-school defendants brought under the Georgia law of agency and the FTC Holder Rule. We agree with the third contention and remand the due process claims for further proceedings in the district court.

III. DISCUSSION

A. Standard of Review

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[3] 20 U.S.C.§ 1082(a)(2) (1994). The provision reads in part:

[T]he Secretary may-

....

(2) sue and be sued in any court of record of a State having general jurisdiction or in any district court of the United States, ... but no attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary or property under the Secretary's control....

This court reviews *de novo* grants of motions to dismiss under Fed. R.Civ. P. 12(b)(6). *See McKusick v City of Melbourne*, 96 F. 3d 478, 482 (11th Cir 1996). The court of appeals will affirm a Rule 12(b)(6) dismissal where it appears the plaintiffs can prove no set of facts in support of their claim entitling them to relief. *See Hartford Fire Ins. Co. v California*, 509 U.S. 764, 811 (1993).

B. The Dismissal of the Borrowers' Claims under the Georgia Law of Agency

On appeal, the borrowers assert that the district court erred in determining that federal law preempts their claims under the Georgia law of agency. They contend that the HEA does not require schools to act as agents of lenders and that imposing liability on the non-school defendants for the school's role as agent does not conflict with the HEA.

We view the preemption issue as a close one. Nevertheless, we conclude that federal law preempts the Georgia law of agency and any other applicable state laws to the extent that they impose liability on the non-school defendants for the school's acts as the purported agent of the lenders.

A majority of courts addressing the issue have determined that federal law preempts state law defenses to student loan enforcement which impose liability based on a relationship between schools and lenders mandated or contemplated by the HEA.[4] The borrowers' claims under the Georgia law of agency

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[4] *See Armstrong v. Accrediting Council for Cont. Educ. & Train., Inc.*, 832 F. Supp. 419, 430-31 & n.25 (D.D.C. 1993) (holding that the HEA preempted state law defenses to loan enforcement based on a school's preparation of the loan application, specification of the type of loan, determination of the loan amount, preparation of the promissory note, selection of the lender, and presentation of terms of loans to borrowers), *vacated on other grounds*, 84 F.3d 1452, 1996 WL 250412 (D.C. Cir 1996); *Jackson v. Culinary Sch. of Washington*, 788 F. Supp. 1233, 1247 (D.D.C. 1992) (holding that the HEA preempts state law defenses to loan enforcement based on a school's participation in preparation of loan instruments), *rev'd on other.grounds*, 27 F.3d 573 (D.C. Cir. 1994); *Tipton v.*

seek to do just that -- impose liability on the non-school defendants based on a relationship between the school and the lenders expressly contemplated, if not mandated, by the HEA. The lenders assert that the school acted as an agent of the lenders by exercising lender functions in procuring loans for the borrowers.[5] Yet the GSLP expressly permits lenders to delegate lender functions to schools with which they enter into "origination relationships." See 34 C.F.R. §§ 682.200; 682.206(a) (b) (1998). Allowing the borrowers' claims would penalize lenders for participating in the GSLP program according to its express terms. This would tend to discourage participation of lenders and guaranty agencies in the program. *Cf. Jackson,* 788 F. Supp. at 1247 ("[A] state law claim cannot lie to the extent that it would penalize participants in the GSL[P] ... for following Congressional directives.") Therefore, the Georgia law of agency and any other applicable state laws "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U. S. 272, 281 (1987), to the extent that they impose liability on the non-school defendants based on the school's exercise of lending functions.

Secretary of Educ., 768 F. Supp. 540, 557-58 (S.D.W.Va. 1991) (holding that the HEA preempts state law defenses to loan enforcement based on a school supplying a lender with loan documents or conditioning a loan upon attendance at a particular school). *But see Moran v. Markerdowne Corp.*, 976 F. Supp. 301, 318-19 (D.N.J. 1997) (holding that the HEA does not preempt state law defenses to the extent they provide borrowers with protection equivalent to that offered by FTC Holder Rule).

[5] The borrowers allege that the school determined who received loans and the amount of the loans, prepared and presented loan forms to borrowers, assisted borrowers in completing forms, collected information about borrowers, verified the identity of borrowers, and obtained the borrowers' signatures on promissory notes.

The district court did not err in determining that federal law preempted the borrowers' claims under the Georgia law of agency. Accordingly, we affirm the dismissal of those claims.[6]

C. The Dismissal of the Borrowers' Claims under the FTC Holder Rule

On appeal the borrowers contend that the district court erred in determining that they had no rights under the FTC Holder Rule. They contend that the Holder Rule subjects the non-school defendants to claims and defenses the borrowers might assert against the school despite the absence from the loan contracts of the notice provision required by the rule. They base their claim on the common law principle that contracts incorporate the law in force at the time of the agreement. *See United Van Lines, Inc. v. United States*, 448 F.2d 1190, 1195 (D.C Cir. 1971) ("Because the regulation was in existence at the time [the partyl entered on performance, it became, in effect, a part of the contract between the parties").[7]

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[6] In their complaint the borrowers asserted that the Secretary's policy against enforcing school originated loans barred the non-school defendants from collecting on the borrowers' loans. The district court dismissed this claim for the reason that the Secretary never promulgated that policy as a binding administrative rule. *Bartels*, 918 F. Supp. at 1569-70.

We view this origination claim as distinct from the borrowers' claim under the Georgia law of agency in that it relies on federal law as opposed to state law. The borrowers do not present the dismissal of the origination claim as a distinct point of error. However, their appeal relies heavily on arguments concerning the effects of an origination relationship on the enforceability of loans under the Secretary's origination policy. To the extent that the borrowers incorporate the origination claim into their agency claim, we agree with and affirm the district court's disposition of the origination claim.

[7] The borrowers also assert that the non-school defendants' failure to ensure inclusion of the notice provision in the loan contracts incurred liability under Georgia tort law. *See. e.g., Peterson v. First Clayton Bank & Trust Co.*, 447 S.E. 2d 63, 67 (Ga. App. 1994) (stating that the violation of a legal duty incident to and created by contract incurs tort liability). The borrowers did not assert Georgia tort law as a basis for liability in the complaint. Consequently, we will

The FTC Holder Rule seeks to protect consumers by requiring that any consumer credit contract or purchase money loan for the sale or lease of goods or services contain a notice provision that the holder of the contract is subject to claims and defenses the consumer might assert against the seller. *Armstrong*, 832 F. Supp. at 431. Every court addressing the issue has determined that the Holder Rule confers no rights or obligations on parties to student loan contracts where the contracts lack the required notice provision.[8]

We agree with these decisions. The omission of the notice provision from the loan contracts deprived the borrowers of any rights they might have had under the Holder Rule. The district court did not err in determining that the borrowers could not hold the non-school defendants liable for the school's conduct under the Holder Rule. Accordingly, we affirm the dismissal of the claims against the non-school defendants brought under the Holder Rule.

D. The Dismissal of the Due Process Claims Against the Secretary

On appeal, the borrowers contend that the district court erred in determining that the HEA's "anti-injunction" provision deprived the court of jurisdiction over the borrowers' due process claims. Conceding that the court lacked jurisdiction over their claims for injunctive relief, they argue that the HEA provision did not deprive the court of jurisdiction over their claims for declaratory relief.

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not now consider this claim *See Bok v. Mutual Assur. Inc.*, 119 F.3d 927, 929 (11th Cir. 1997) ("Generally, this Court will not consider issues that the appellant failed to raise below.").

[8] *See Williams v. National Sch. of Health Technology, Inc.*, 836 F. Supp. 273, 282-83 (E.D. Pa. 1993), *affd*, 37 F.3d 1491 (3rd Cir. 1994); *Armstrong*, 832 F. Supp. at 432; *Jackson*, 788 F. Supp. at 1251; *Vietnam Veterans of Am. v. Guerdon Indus., Inc.*, 644 F. Supp. 951, 964-65 (D. Del. 1986).

The HEA provides that "no attachment, injunction, garnishment, or other similar process, mesne, or final shall be issued against the Secretary ..." 20 U.S.C. § 1082(a)(2)(1994). The plain language of this provision deprives courts of jurisdiction over claims for injunctive relief against the Secretary. However, anti-injunction clauses in federal statutes do not as a rule preclude declaratory relief. *See Thomas v. Bennett*, 856 F. 2d 1165, 1168 (8th Cir.1988) (holding it proper for the district court to consider declaratory relief against Secretary); *Ulstein Maritime, Ltd. v. United States* 833 F.2d 1052, 1055 (1st Cir. 1987) (stating that declaratory relief is a "milder form" of injunctive relief and is frequently available where injunctive relief is unavailable). Anti-injunction clauses only preclude declaratory relief where declaratory relief amounts to the equivalent of injunctive relief. *Cf. Expedient Serv. Inc. v. Weaver*, 614 F.2d 56, 58 (5th Cir. 1980) (holding that statutory provision against injunctive relief barred claim where plaintiffs sought relief equivalent to injunctive relief).

The district court determined that the HEA deprived the court of jurisdiction over the borrowers' claims for declaratory relief, viewing the claims as the equivalent of claims for injunctive relief. *Bartels*, 918 F. Supp. at 1574. The court determined that the borrowers "only seek to enjoin the Secretary from collecting on their student loans." *Id.* We disagree with this conclusion of the district court. The borrowers sought a declaration that certain of the Secretary's wage garnishment procedures violate due process. This declaratory relief does not amount to the equivalent of injunctive relief. Granting this relief would not prevent the Secretary from collecting on loans altogether; it would only require the use of proper and constitutional garnishment and other collection measures. Consequently, the HEA's "anti-injunction" provision does not deprive the court of jurisdiction to consider the appropriateness of declaratory relief on the borrowers' due process claims.

As an alternative ground for affirming the dismissal of the due process claims, the Secretary asserts that the borrowers have

not presented a "ripe" claim for judicial review. The Secretary claims that the garnishment notices received by borrowers were only "preliminary" and that the Secretary has not garnished the wages of any named borrowers. The Secretary asserts that the borrowers cannot challenge the constitutionality of wage garnishment procedures until the borrowers suffer actual garnishment.

The borrowers assert several due process violations in the Secretary's wage garnishment procedures. They assert that the Secretary gives borrowers insufficient time to request a garnishment hearing. This claim amounts to challenging the facial validity of § 1095a(b) of the wage garnishment statute, which gives borrowers fifteen days from the mailing of garnishment notices to request a pregarnishment hearing. See 20 U.S.C. § 1095a(b)(1994). They also assert that the Secretary denies the borrowers their statutory rights to a hearing and repayment schedule, *see* 20 U.S.C. § 1095a(a)(4)(5) (1994), by locating hearings too far away for borrowers to attend, failing to make an administrative record of hearings, and sending notices threatening wage garnishment without informing borrowers of their rights to a hearing and repayment schedule.[9]

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[9] The notices read:

IMPORTANT ANNOUNCEMENT: THE EMERGENCY UNEMPLOYMENT COMPENSATION ACT OF 1991 (P.L. 102-164), AMENDED THE HIGHER EDUCATION ACT OF 1965 TO INCLUDE SECTION 488(A) ... TO REQUIRE EMPLOYERS, WHO EMPLOY AN INDIVIDUAL WHO IS NOT REPAYING THEIR DEFAULTED STUDENT LOAN, TO BEGIN DEDUCTING TEN PERCENT OF THE DEBTOR'S TAKE-HOME PAY IN ORDER TO RECOVER THE ENTIRE BALANCE DUE. UNDER THIS AUTHORITY, NO LEGAL ACTION IS REQUIRED TO OBTAIN ADMINISTRATIVE COOPERATION FROM THE EMPLOYER. THIS NOTICE IS INTENDED AS AN ADVISORY TO ENCOURAGE THOSE, NOT CURRENTLY PAYING, TO MAKE ARRANGEMENTS TO VOLUNTARILY REPAY THEIR STUDENT LOANS BEFORE MORE SERIOUS ACTIONS ARE TAKEN

The district court did not address the ripeness issue due to its determination that it lacked jurisdiction over the due process claims. We cannot decide the ripeness issue on the record we have before us on appeal. The district court should resolve the ripeness issue, as it may require consideration of evidence beyond the allegations of the complaint. Accordingly, we remand the due process claims to the district court for resolution of the ripeness issue and, if necessary, the merits of the due process claims, in light of the complaint and any additional evidence that may prove necessary.

In summary, the district court erred in determining that the HEA deprived the court of jurisdiction over the borrowers' requests for declaratory relief on the due process claims. We remand those claims to the district court.

IV. CONCLUSION

We affirm the dismissal of the borrowers' claims against the non-school defendants based on the Georgia law of agency and the FTC Holder Rule. We reverse the dismissal of the borrowers' due process claims against the Secretary's wage garnishment procedures based on the HEA's anti-injunction provision. We remand those claims for resolution of whether the claims are "ripe" for judicial review and, if necessary, consideration on the merits.[10]

AFF1RMED, REVERSED and REMANDED.

AGAINST THEM.

(Dist. Ct. No. 94-CF-150, R. 1, Exh. D).

[10] As to any other extant issues relating to the fraud or breach of contract claims against the non-school defendants, we adopt the disposition and reasoning of the district court.

FILED, Dec. 15, 1995

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

EDDIE BARTELS, et al.,

Plaintiffs,

v.

ALABAMA COMMERCIAL COLLEGE, Inc. d/b/a Riley Training Institutes of Savannah, Waycross and Brunswick, Georgia, Defendant; RICHARD RILEY, Secretary, U. S. Department of Education, in his official capacity, Defendant; HIGHER EDUCATION ASSISTANCE FOUNDATION, Defendant; GEORGIA HIGHER EDUCATION CORPORATION, Defendant; and STUDENT LOAN MARKETING ASSOCIATION,

Defendants.

CIVIL ACTION NO. CV294-150

ORDER

Defendants, Student Loan Marketing Association, the Higher Education Assistance Foundation, the Georgia Higher Education Assistance Corporation, and the Secretary of the United States Department of Education, Richard Riley (collectively referred to as the "non-school Defendants"), have each filed a Motion to Dismiss Plaintiffs' amended complaint. For the reasons discussed below, the non-school Defendants' motions will be **GRANTED**.

FACTS

Plaintiffs are a putative class of former students of Alabama Commercial College, Inc., d/b/a the Riley Training Institutes of Savannah, Waycross, and Brunswick, Georgia. From September of 1988 to November of 1990, these schools allegedly recruited the Plaintiffs, induced them to sign up for federally guaranteed student loans, and then failed to provide the promised quality of education or job placement.

Plaintiffs' amended complaint names as Defendants, Alabama Commercial College, Inc. d/b/a Riley Institute ("Riley Institute"), the Secretary of the United States Department of Education, Richard Riley ("Secretary Riley"), the Higher Education Assistance Foundation ("HEAF"), the Georgia Higher Education Assistance Corporation ("GHEAC"), and the Student Loan Marketing Association ("Sallie Mae"). Riley Institute is a now-defunct corporation that provided vocational training in Southeast Georgia. Secretary Riley is responsible for implementing and overseeing the Guaranteed Student Loan Program (now called the Federal Family Education Loan Program, or "FFEL") and other related educational programs. GHEAC and HEAF guaranteed some of the Plaintiffs' student loans and are allegedly assignees of some of these loans. Sallie Mae is in the business of buying student loans in the secondary market and currently holds some of those loans.

In their amended complaint, Plaintiffs seek rescission of their loan contracts, declaratory and injunctive relief, actual and punitive damages, attorneys' fees and costs. In Count One of their complaint, Plaintiffs are suing Riley Institute, GHEAC, HEAF, and Sallie Mae for fraud. In Counts Two and Three, Plaintiffs are suing all the Defendants for breach of contract and for violations of the Uniform Deceptive Trade Practices Act. In Count Four, Plaintiffs are suing Riley Institute, GHEAC, and HEAF for the tort of ex delicto contract breach. Finally, in Count Five, Plaintiffs are suing Secretary Riley for Violations of Due Process.

DISCUSSION

I. The Standard for Evaluating a Motion to Dismiss

Rule 12(b)(6) of the Federal Rules of Civil Procedure permits a defendant to move to dismiss a complaint on the ground that the plaintiff has failed to state a claim upon which relief can be granted. A motion under Rule 12(b)(6) attacks the legal sufficiency of the complaint. In essence, the movant says, "Even if everything you allege is true, the law affords you no relief." Consequently, in determining the merits of a 12(b)(6) motion, a court must assume that all of the factual allegations of the complaint are true, *e.g.*, *United States v. Gaubert,* 499 U.S. 315, 327, 111 S. Ct. 1267, 1276, 113 L. Ed. 2d 335 (1991); *Powell v. Lennon,* 914 F.2d 1459, 1463 (11th Cir. 1990), and construe them in the light most favorable to the plaintiff. E.g., *Sofarelli Pinellas v. County,* 931 F.2d 718, 721 (11th Cir. 1991).

II. Can Count One of Plaintiffs' Complaint Survive Defendants' Motions to Dismiss?

In Count One of their complaint, Plaintiffs assert a cause of action of fraud against Riley Institute, GHEAC, HEAF, and Sallie Mae. Under Rule 9(b) of the Federal Rules of Civil Procedure, a plaintiff must state "the circumstances of fraud . . . [in his complaint] . . . with particularity." Fed. R. Ci Pro. 9(b). A complaint satisfies Rule 9(b) if it alleges the date, time, or place of the alleged fraud or if it alleges alternative means sufficiently detailed to connect the allegations to the defendant[s]. *Durham v. Business Management Associates,* 847 F.2d 1505, 1511 (11th Cir. 1988). Plaintiffs do not cite any direct actions of GHEAC, HEAF, or Sallie Mae, but, rather, only describe the allegedly fraudulent actions of Riley Institute. In an attempt to connect Defendants, GHEAC, HEAF, and Sallie Mae, to the conduct of Riley Institute, Plaintiffs claim that 1) Riley Institute and GHEAC, HEAF, and Sallie Mae stood in an origination relationship under 34 C.F.R. § 682.200, 2) that the promissory notes signed by Plaintiffs implicitly include the notice required by the FTC Holder Rule (the "FTC Holder Rule notice"), 3) that GHEAC, HEAF, and Sallie

Mae are assignees of an integrated, mutually dependent contract with Riley Institute and its students, and 4) that GHEAC, HEAF, and Sallie Mae engaged in an agency/joint venture relationship with Riley Institute whereby the non-school Defendants aided and abetted Riley Institute in the procurement of Plaintiffs' student loans.

A. Would the Existence of an Origination Relationship Allow Count One to Survive Defendants' Motion to Dismiss?

Plaintiffs first predicate their fraud count upon an alleged origination relationship under 34 C.F.R. 682.200 between the school and the lenders.[1] Plaintiffs claims that such a relationship would enable them to assert against GHEAC, HEAF, and Sallie Mae the defenses to the student loan contract that could be asserted against Riley Institute.

In support of their assertion, Plaintiffs cite statements of the Secretary of Education from 1988 to 1992 to Congressmen and in briefs submitted to various courts. In these statements, the

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[1] The federal regulations effective when Plaintiffs obtained their loans defined an origination relationship to be:

> A special relationship between a school and a lender, in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making loans. In this situation, the school is considered to have "originated" a loan made by the lender. The Secretary [of Education] determines that "origination" exists if, for example --
>
> > (1) A school determines who will receive a loan and the amount of the loan; or
> > (2) The lender has the school verify the identity of the borrower or complete forms normally completed by the lender.

34 C.F.R. § 682.200 (1989).

Secretary stated that when an origination relationship existed and when the loans were wholly or partially unenforceable against the student borrowers, the Department of Education's policy was to forbear enforcement of the loans. *See e.g.*, Letter from Dept. of Educ. Deputy Assistant Secretary for Student Fin. Assistance, Dewey L. Norman, to W.N. Kirby, Comm'r of Educ., Texas Educ. Agency, of 7/17/88 (Pl['s] Response at Ex. 11); Letter from Dept. of Educ. Acting Assistant Secretary Kenneth Whitehead, to Congressman Stephan J. Solarz, 5/19/88 (Pl['s] Response at Ex. 10); *Armstrong v. Accrediting Council,* 832 F. Supp. 419, 433 (D.D.C. 1993)(describing Secretary's Brief in Support of its Motion to Dismiss); *Williams v. Nat'l Sch. of Health Technology,* 836 F. Supp. 273, 284-85 (E.D.Pa. 1993)(same).

While this is an issue of first impression in the Eleventh Circuit, courts in other jurisdictions have held that such a theory cannot be used against third parties like GHEAC, HEAF, and Sallie Mae. In reaching its decision, these courts have reasoned that the Secretary's statements were never promulgated as a rule under § 553 of the Administrative Procedure Act ("APA"). *See, e.g., Williams,* 836 F. Supp. at 284-85 (E.D. Pa. 1993). The Court agrees, for federal agencies must comply with the APA's procedural requirements for rulemaking. *Chrysler Corp. v. Brown,* 441 U.S. 281, 303, 99 S. Ct. 1705, 60 L. Ed. 2d 208 (1979) citing *Morton Ruiz,* 415 U.S. 199, 232, 94 S. Ct. 1055, 39 L. Ed. 2d 270 (1974). "Although an agency may choose to bind itself in an informal manner, it cannot regulate third parties other than by utilizing the mechanisms of the APA." *Williams,* 836 F. Supp. at 285. Thus, the existence of an origination relationship between the school and the lenders would not allow Count One to survive the Defendants' Motion to Dismiss.

B. Is the Notice Required by the FTC Holder Rule Implicitly Included in the Promissory Notes Signed By Plaintiffs?

Plaintiffs next claim that Defendants, GHEAC, HEAF, and Sallie Mae, may be sued for fraud because the notice required by 16 C.F.R. § 433.2, the Federal Trade Commission Holder Rule

(the "FTC Holder Rule"), is implicitly included in their promissory notes.[2] Even assuming that the FTC Holder Rule applies to student loan transactions, a plaintiff has no rights under the rule if the notice is omitted from the contract. See *Armstrong v. Accrediting Council,* 832 F. Supp. 419, 432 (D.D.C. 1993); *Williams,* 836 F. Supp. at 283 (citing *Vietnam Veterans of America Inc. v. Guerdon Industries, Inc.,* 644 F. Supp. 951, 964-65 (D.Del. 1986). Furthermore, there is no private cause of action under the FTC Holder Rule. *Williams,* 836 F. Supp. at 283; *Heastie v. Community Bank of Greater Peoria,* 727 F. Supp. 1133, 1139, opinion supplemented, 727 F. Supp. 1140 (N.D. Ill. 1989). Rather, enforcement of the rule is the sole province of the Federal Trade Commission. *Holloway v. Bristol-Myers Corp.,* 158 U.S. App. D.C. 207, 485 F.2d 986, 1002 (D.C. Cir. 1973).

Plaintiffs nonetheless argue that state law implies the FTC Holder Rule notice into their promissory notes with the Defendants. In support of their claim, they cite the legal proposition that "laws which exist at the time and place of making of a contract, enter into and form a part of it." *See Walter v. Orkin*

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[2] The FTC Holder Rule states that "it is an unfair or deceptive act or practice within the meaning of section 5 of [the Federal Trade Commission Act, 15 U.S.C. § 41 *et seq.*,] for a seller, directly or indirectly, to:

> (a) Take or receive a consumer credit contract which fails to contain the following provision in at least ten point, bold face, type:
>
> NOTICE
>
> ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.

16 C.F.R. § 433.2.

Exterminating Co., 192 Ga. App. 621, 622, 385 S.E.2d 725 (1989) (citations omitted). This argument fails because no court in this nation has found that its state's laws implicitly include the notice in contracts made in that state or under its laws.[3] Accordingly, the FTC Holder Rule is not implicitly included in Plaintiffs' student loan contracts.

C. Are GHEAC, HEAF, and Sallie Mae Assignees of an Integrated, Mutually Dependent Contract?

Plaintiffs also assert that their fraud claim is supported by GHEAC, HEAF, and Sallie Mae's alleged status as assignees of an integrated, mutually dependent contract with Riley Institute and its students. No court in the nation has recognized this theory in the student loan context. Neither should this Court, for under the Higher Education Act ("HEA"), student loans are structured as two separate transactions. *Williams,* 836 F. Supp. at 282 (citing 20 U.S.C. § 1085*)*. Indeed, one transaction is a contract between the school and the student for educational services, and another transaction is between the student and the lender for financial services.

Furthermore, under Georgia law, a mutually dependent contract must be between the same parties. *Moran v. NAV Services,* 189 Ga. App. 825, 826, 377 S.E.2d 909 (1989). In this case, the contracts claimed by Plaintiff to be mutually dependent are not between the same parties. For instance, there are contracts between Riley Institute and the students, as well as contracts between the students and the lenders. There are also guaranty

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[3] Athough it is not helpful in this action, Congress has since attempted to afford relief to students who obtain loans after enrolling in questionable schools. Title 20, Section 1082(m)(1), of the United States Code, now requires the Department of Education to develop a common loan application form and promissory note to be used by "the Secretary, in cooperation with representatives of guaranty agencies, lenders, and all organizations involved in student financial assistance." 20 U.S.C. § 1082(m)(1) (1995 Supp.). This form, which went into effect in 1994, incorporates the notice required by the FTC Holder Rule. *See Bartels v. Alabama Commercial College,* 54 F.3d 702, 705 n.3 (11th Cir. 1995).

agreements between the lenders and the guaranty agencies, GHEAC and HEAF (the "guaranty agencies"), whereby GHEAC or HEAF guarantees to the lenders that the loans will be paid. Additionally, there are reinsurance agreements between Secretary Riley and the guaranty agencies whereby Secretary Riley promises to reimburse the guaranty agencies as long as they attempt, with due diligence, to collect on a defaulted loan. Thus, for these reasons, GHEAC, HEAF, and Sallie Mae are not assignees of an integrated, mutually dependent contract.

D. Can Plaintiffs' Assertion of an Agency/Joint Venture Relationship Allow Count One of the Amended Complaint to Survive Defendants Motions to Dismiss?

Plaintiffs' final theory in support of their Count alleging fraud is that GHEAC, HEAF, and Sallie Mae engaged in an agency/joint venture relationship whereby the non-school defendants aided and abetted Riley Institute in the procurement of student loans. Plaintiffs state that GHEAC, HEAF, and Sallie Mae acted as agents of Riley Institute by "obtaining the students' signatures on the student loans." (Pl[s'] amended compl. at P 119). Plaintiffs further state that GHEAC, HEAF, and Sallie Mae "benefitted from their agent/joint venturers' actions in that they received payments for the federally guaranteed loans they made to the students." (Pl[s'] amended compl. at P 120).

The close relationship alleged by Plaintiffs is mandated by the HEA and federal law. *See, e.g.*, 20 U.S.C. § 1078(a)(2)(requiring a school to provide information to the lender concerning a student's estimated cost of attendance, his estimated financial assistance and a schedule for the disbursement of loan proceeds); 20 U.S.C. § 1077a (describing permitted interest rates); 20 U.S.C. § 1092 (requiring schools to inform students about the details of federal student loans). As such, Plaintiffs' claim of an agency/joint venture relationship conflicts with the purposes and procedures of the HEA and is, thus, preempted by it. *See Tipton v. Secretary of Educ. of U.S.*, 768 F. Supp. 540, 558 (D.W.Va. 1991)(finding a plaintiff's claim preempted by 20

U.S.C. § 1078(a)(2)).[4] Thus, Plaintiffs cannot assert an agency/joint venture relationshIp.

For the above reasons, Plaintiffs have alleged no theory that connects GHEAC, HEAF, or Sallie Mae to Riley Institute's allegedly fraudulent acts. Consequently, Count I cannot survive GHEAC's, HEAF's, and Sallie Mae's Motions to Dismiss.

III. Can Count Two of Plaintiffs' Amended Complaint, Alleging Breach of Contract, Survive Defendants' Motion to Dismiss?

In Count Two of their amended complaint, Plaintiffs are suing Riley Institute, GHEAC, HEAF, Sallie Mae, and Secretary Riley for breach of contract. As a preliminary matter, a breach of contract action cannot be maintained against a defendant unless there is a contract. Here, there is no contract between the Plaintiffs and GHEAC, HEAF, Sallie Mae, or Secretary Riley. Plaintiffs beg the Court to find a contract exists, based on theories of an origination relationship forbearance policy, of an implicit inclusion in their promissory notes of the FTC Holder Rule notice, of an integrated, mutually dependent contract theory, and of an agency/joint venture theory. Because the Court has already dismissed those theories as they relate to GHEAC, HEAF, and Sallie Mae, the theories against these same Defendants are also dismissed in this Count. In like manner, in relation to their suit against Secretary Riley, Plaintiffs' theories of an implied FTC Holder Rule notice, of an integrated, mutually dependent contract, and of an agency/joint venture theory are identical to the theories used against GHEAC, HEAF, and Sallie Mae. Plaintiffs' origination relationship forbearance theory, however, is different from that asserted against GHEAC, HEAF, and Sallie Mae

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[4] Because the Court will dismiss Plaintiffs' fraud claim to the extent it is asserted against GHEAC, HEAF, and Sallie Mae, it is unnecessary to consider Sallie Mae's arguments concerning the Statute of Limitations. Neither does the Court need to consider GHEAC's argument that promises relating to future events are not actionable.

because Plaintiffs intend for the Secretary to be bound by his own assertions. Thus, it only needs to be determined whether Secretary Riley can be sued for breach of contract under Plaintiffs' theory of an origination relationship forbearance policy.

As stated previously, from 1988 to 1992, the Secretary of Education made statements in letters and in memoranda to courts that when an origination relationship existed and when the loans were wholly or partially unenforceable against the student borrowers, the Department of Education would not seek enforcement of a student loan. At most, these assertions were an informal policy,[5] for only substantive rules, promulgated according to § 553 of the APA, have the force and effect of law. *Batterton Francis,* 432 U.S. 416, 425 n.9, 97 S. Ct. 2399, 53 L. Ed. 2d 448 (1977); *Smith v. Russellville Production Credit Ass'n,* 777 F.2d 1544, 1547-48 (11th Cir. 1985). In this regard, this case is very similar to the decision of the former Fifth Circuit, Unit B, in *United States v. Harvey,* 659 F.2d 62 (5th Cir. Unit B, October 15, 1981).[6] In Harvey, the appellants sought to enjoin the foreclosure of deeds used as security in a loan with the Veterans Administration ("VA"). In support of their contention, the appellants argued that the VA failed to service loan accounts properly, according to its manual. *Id.* The court found that the VA manual was merely an informal policy and, consequently, did not "create substantive rights in the mortgagor enforceable in federal court." *Id.* at 65-66. Later, in *Bright v. Nimmo,* 756 F.2d 1513, 1516 (11th Cir. 1986), the Eleventh Circuit applied the reasoning of Harvey to find that the VA manual did not confer a private cause of action against the Veterans Administration and/or a

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[5] Plaintiffs argue that the Secretary's assertions were more than an informal policy because, at one time the Department of Education intended to codify it. *See 55 Fed. Reg. 48327* (No 20, 1990). The Department, however, later decided not to codify the policy. *See* 57 Fed. Reg. 60304 (Dec. 19, 1992).

[6] Decisions of the former Fifth Circuit, Unit B, rendered after September 30, 1981, are binding precedent in the Eleventh Circuit. *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982).

private lender. The instant case is very similar to the actions in Harvey and in Bright, in that it concerns an informal policy and the issue of whether that policy may be used in defense of a loan obligation. It only follows, then, that the Secretary's assertion may not be used to cancel Plaintiffs' student loan debts.

Further, contrary to Plaintiffs' warning, the Court's holding in the present action does not allow Secretary Riley to disregard his own policies. The Secretary's policy was that the Department of Education would refrain from trying to enforce unenforceable loans, not that an origination relationship creates a private cause of action for breach of contract. *See Jackson v. Culinary Sch. of Washington,* 307 U.S. App. D.C. 123, 27 F.3d 573, 585 (D.C. Cir. 1994), *vacated on other grounds*, *U.S.* , 115 S. Ct. 2573, 132 L. Ed. 2d 824 (1995).[7] Thus, an origination relationship forbearance theory cannot be asserted against Secretary Riley. And Count Two, alleging breach of contract cannot survive Secretary Riley, GHEAC, HEAF, and Sallie Mae's Motions to Dismiss.

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[7] Because the Court will dismiss Plaintiffs' breach of contract claim against GHEAC, HEAF, Sallie Mae, and Secretary Riley, it need not consider GHEAC's argument that consideration was received. Neither does the Court need to consider GHEAC's argument that the conditions for rescission are not present.

V. Can Count Three of Plaintiffs' Amended Complaint, Alleging Violations of the Uniform Deceptive Trade Practices Act, Survive Defendants' Motions to Dismiss?

Plaintiffs claim that Defendants violated the Uniform Deceptive Trade Practices Act. O.C.G.A. § 10-1-371 *et seq.*, This Act, however, does not address the situation at bar. Rather, it is designed to remedy unfair trade practices among competitors by regulating the naming, advertising and promotion of goods and services. *See* O.C.G.A. § 10-1-371 *et seq.*; *Boynton State Farm Mutual Automobile Insurance Company,* 207 Ga. App. 756, 757, 429 S.E.2d 304 (1993).[8]

IV. Can Count Four, Alleging an Ex Delicto Contract Breach, Survive Defendants' Motions To Dismiss?

In Count Four of their amended complaint, Plaintiffs assert that Defendants committed an Ex Delicto Contract Breach. In such an action, however, it is necessary that there be a contract between a defendant and a plaintiff. *See Orkin Exterminating Co. v. Stevens,* 130 Ga. App. 363, 365, 203 S.E.2d 587 (1973). Here, there is no contract between Plaintiffs and Defendants, GHEAC, HEAF, and Sallie Mae, and, accordingly, Count Four cannot survive GHEAC's, HEAF's, and Sallie Mae's Motions to Dismiss.[9]

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[8] In order to show that Defendants, GHEAC, HEAF, Sallie Mae, and Secretary Riley, violated the Uniform Deception Trade Practices Act, Plaintiffs claim that the Defendants aided and abetted Riley Institute, that these same Defendants failed to ensure placement of the FTC Holder Rule notice in the consumer contracts, that they failed to comply with the HEA, that they failed to comply with the Georgia Proprietary School Act, that they misrepresented the quality of their goods and services, and that Secretary Riley did not comply with the Emergency Unemployment Compensation Act. The Court will not address these theories because it grants GHEAC, HEAF, Sallie Mae, and Secretary Riley's Motions to Dismiss Count Three of Plaintiffs' Amended Complaint, alleging violations of the Uniform Deceptive Trade Practices Act.

[9] Plaintiffs allege that Defendants, GHEAC, HEAF, and Sallie Mae, committed an ex delicto contract breach because they failed to ensure placement of the FTC Holder Rule in the student loan documents. Since Count Four,

VI. Can Count Five, Alleging that Secretary Riley Violated Plaintiffs Due Process Rights, Survive the Secretary Riley's Motion to Dismiss?

In their final Count, Plaintiffs seek declaratory and injunctive relief for Violations of Due Process. Secretary Riley claims that Plaintiffs' claim is barred by the HEA's anti-injunction provision contained in 20 U.S.C. § 1082(a)(2).[10] Courts have interpreted this "anti-injunction" provision to bar injunctive relief unless the Secretary has exceeded the scope of his authority. *See Canterbury Career Sch., Inc. v. Riley,* 833 F. Supp. 1097, 1103 (D.N.J. 1993). Plaintiffs have not alleged that Secretary Riley has exceeded his authority and, thus, Plaintiffs' claim for injunctive relief against the Secretary is barred by 20 U.S.C. § 1082(a)(2). Additionally, Plaintiffs' claims for declaratory relief is also barred by § 1082(a)(2) because it is apparent from Plaintiffs' complaints and briefs that Plaintiffs only seek to enjoin the Secretary from collecting on their student loans. *See Expedient Services, Inc. v. Weaver,* 614 F.2d 56, 58 (5th Cir. 1980)[11].[12] Accordingly, Count Five cannot survive Secretary Riley's Motion to Dismiss.

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asserting an ex delicto contract, is dismissed against GHEAC, HEAF, and Sallie Mae, the Court will not consider Plaintiffs' theory.

[10] Section 1082(a)(2) states in pertinent part:

> No attachment, injunction, garnishment, or other similar process, mesne or final, shall be issued against the Secretary [of Education] or property under the Secretary's control.

20 U.S.C. § 1082.

[11] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are binding precedent in the Eleventh Circuit. *See Bonner City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981)(en banc).

[12] Since the Court will dismiss Count Five of Plaintiffs' Amended Complaint, it need not consider Secretary Riley's arguments concerning Ripeness, Standing, and the Merits of Plaintiffs' Due Process Claim.

VII. Do Plaintiffs Have a Cause of Action Under the Higher Education Act?

Throughout Plaintiffs' amended complaint are references to the Higher Education Act. After analyzing the factors articulated in *Cort v. Ash,* 422 U.S. 66, 78, 95 S. Ct. 2080, 2088, 45 L. Ed. 2d 26 (1975), it is clear that there is no private cause of action under the HEA. The four factors articulated in Cort are

> 1) whether the plaintiffs constitute "one of the class for whose especial benefit the statute was enacted;" 2) whether there is "any indication of legislative intent, explicit or implicit, either to create a remedy or to deny one;" 3) whether inferring a private right of action would be "consistent with the underlying purposes of the legislative scheme;" and 4) whether the cause of action "is traditionally relegated to state law . . . so that it would be inappropriate to infer a cause of action based solely on federal law."

Cort, 422 U.S. at 78. In determining whether a private cause of action exists, the primary inquiry is Congressional intent. *Northwest Airlines Inc. v. Transport Workers Union of America, AFL-CIO,* 451 U.S. 77, 94, 101 S. Ct. 1571, 1582, 67 L. Ed. 2d 750 (1981).

Clearly the HEA was enacted to benefit plaintiffs as former students attending a post-secondary institution. However, that is not the end of the inquiry, for consideration under the other three factors reveals that a private right of action should not be implied. The second *Cort* factor is an inquiry into congressional intent. When a statute provides detailed administrative remedies, there is a presumption that Congress did not intend to create a private cause of action but, rather, that it provided precisely the remedies it considered appropriate. *See Karahalios v. Nat'l Fed'n of Fed. Employees, Local 1263,* 489 U.S. 527, 532-33, 109 S. Ct. 1282, 1286, 103 L. Ed. 2d 539 (1989)(citations omitted). In this case, Congress has provided a detailed regulatory scheme. *See* 34 C.F.R. §§ 668.84 et seq.; 20 U.S.C. §§ 1070(b), 1071, 1082, 1094

(delegating to the Secretary broad enforcement responsibilities). Thus, it can be inferred that Congress did not intend to create a private remedy.[13] Further, any implication of a private cause of action would frustrate the legislative scheme because, it would interfere with the broad enforcement powers of the Secretary. *See L'GGRKE v. Benkula,* 966 F.2d 1346, 1348 (10th Cir. 1992). Similarly, by applying the fourth factor, it is apparent that no private right of action exists. A reading of Plaintiffs' complaint reveals causes of action for fraud, breach of contract and violations of Georgia statutes, all areas which are "traditionally relegated to state law." *See Cort,* 422 U.S. at 78.

Although the Court reaches this decision through its own analysis, it is important to note that an overwhelming majority of Courts who have considered this issue have also found that there is no private cause of action under the HEA. *See L'GGRKE Benkula,* 966 F.2d 1346, 1348 (10th Cir. 1992); *Moy v. Adelphi Institute, Inc.,* 866 F. Supp. 696, 705 (E.D.N.Y. 1994); *Williams v. Nat'l Sch. of Health Technology,* 836 F. Supp. 273, 278 (E.D.Pa. 1993); *Hudson v. Academy of Court Reporting, Inc.,* 746 F. Supp. 718, 721 (S.D. Ohio 1990); *Graham v. Security Sav. and Loan,* 125 F.R.D. 687, 693 (N.D.Ind. 1989), *aff'd sub nom Veal v. First American Sav. Bank,* 914 F.2d 909 (7th Cir. 1990); *St. Mary of the Plains v. Higher Ed. Loan Program,* 724 F. Supp. 803, 808 (D.Kan. 1989). Thus, for all of the above reasons, the Court hold that Plaintiffs do not have a cause of action under the Higher Education Act.

CONCLUSION

For the above reasons, the Motions of Defendants, GHEAC, HEAF, Sallie Mae, and Secretary Riley, to Dismiss Plaintiffs'

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[13] It might be argued that Congress intended to create a private cause of action in 20 U.S.C. 1082(a)(2), which allows the Secretary of Education, with some exceptions, to "sue and be sued." Such provisions are to be construed only as a jurisdictional grant and cannot be used to imply a private cause of action. *See United States v. Testan,* 424 U.S. 392, 400, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976).

Amended Complaint are GRANTED.[14] Accordingly, the Clerk is directed to enter a judgment dismissing Plaintiffs' claims against all Defendants, excepting Riley Institute.

SO ORDERED, this 15th day of December, 1995.
Anthony A. Alaimo

JUDGE, UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

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[14] Because the Court grants these Defendants' motions, it need not consider Secretary Riley's argument that Plaintiffs' Amended Complaint is, in essence, educational malpractice.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF GEORGIA
BRUNSWICK DIVISION

EDDIE BARTELS, et al.,

Plaintiffs,

v.

ALABAMA COMMERCIAL COLLEGE, Inc.
d/b/a Riley Training Institutes of Savannah,
Waycross and Brunswick, Georgia, Defendant;
RICHARD RILEY, Secretary, U. S. Department of Education, in his official capacity,

Defendant;

HIGHER EDUCATION ASSISTANCE FOUNDATION,

Defendant;

GEORGIA HIGHER EDUCATION CORPORATION, Defendant; and STUDENT LOAN MARKETING ASSOCIATION,

Defendants.

CIVIL ACTION
NO. CV294-150

JUDGMENT

This action came before the Court on motions to dismiss. The issues have been considered and a decision rendered.

IT IS ORDERED AND ADJUDGED that in accordance with the Court's Order dated December 15, 1995, granting defendant STUDENT LOAN MARKETING ASSOCIATION, THE HIGHER EDUCATION ASSISTANCE FOUNDATION,

THE GEORGIA HIGHER EDUCATION ASSISTANCE CORPORATION and THE SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION, RICHARD RILEY motions to dismiss judgment is hereby entered dismissing Plaintiffs' claim against all Defendants, excepting Riley Institute.

Dated this 15th day of December, 1995.

HENRY R. CRUMLEY, JR., CLERK
BY: _____
Deputy Clerk

Department of Education
Guaranteed Student Loan Program Regulations

§ 682.200 Definitions

(b) The following definitions also apply to this part:

* * *

Origination: A special relationship between a school and a lender, in which the lender delegates to the school, or to an entity or individual affiliated with the school, substantial functions or responsibilities normally performed by lenders before making FFEL loans. In this situation, the school is considered to have "originated" a loan made by the lender.

§ 682.206 Due diligence in making a loan.

(a) *General.* (1) Loan-making duties include processing the loan application and other required forms, approving the borrower for a loan, determining the loan amount, explaining to the borrower his or her rights and responsibilities under the loan, and completing and having the borrower sign the promissory note.

(2) A lender that delegates substantial loan-making duties to a school on a loan thereby enters into a loan origination relationship with the school in regard to that loan. If that relationship exists, the lender may rely in good faith upon statements of the borrower made in the loan application process, but may not rely upon statements made by the school in that process. A non-school lender that does not have an origination relationship with a school with respect to a loan may rely in good faith upon statements of both the borrower and the school in the loan application process. Except as provided in 34 CFR part 668, subpart E, a school lender may rely in good faith upon statements made by the borrower in the loan application process.

(b) *Processing forms*. Before disbursing a loan, a lender must determine that all required forms have been accurately completed by the borrower, the student, the school, and the lender. A lender may not ask the borrower to sign any loan form before all the information requested from the borrower on that form.